Report of the Special Committee

of the

Legislative Assembly of Prince Edward Island

on the

Constitution of Canada

September, 1991

92-00763/

CHARLOTTETOWN CONFERENCE

At anchor in the harbour, far enough
out not to make shadows on the land

The ship's tall masts broke a pathway
to the wharf a dory-row away

First a call to the Cross Keys for a bracer
then on to government house to stand

Forever against those arched windows, the men
who knew better than they 'builded' - a nation

With a pot middle and skinny arms and legs -
vague promises of continuous communication

Before struggling back to the ship
a hundred and twenty-five years ago

To splice the main brace and run up
the sails for the other sea.

- Frank J. Lewell (from
Crowbush and Other Poems)

FOREWORD

The Special Committee on the Constitution of Canada was established during the Third Session of the 58th General Assembly of the Legislative Assembly of Prince Edward Island. The motion directed that the Special Committee "meet to consult with all interested Islanders in an effort to examine and reconcile the competing visions of Canada and to make recommendations on courses of action on how to achieve a strong and united Canada from sea to sea to sea." A further motion passed during the same Session authorized the Special Committee to meet during the intersession between the Third and Fourth Sessions, and further, directed the Committee to receive public opinion and make recommendations on the Constitution of Canada. It was also directed to submit a report to Mr. Speaker no later than January 15, 1992, and Mr. Speaker was authorized to release the report on its receipt.

The members of the Special Committee are as follows:

Mr. Walter McEwen, Chairman
Hon. Leone Bagnall
Mr. Walter Bradley
Mr. Alan Buchanan
Mr. Albert Fogarty
Hon. Barry Hicken
Mrs. Marion Murphy

The Special Committee was assisted in its work by Wayne MacKinnon, Secretary and Charles MacKay, Clerk Assistant and Clerk of Committees.

The Special Committee's findings and recommendations are included in this report.

Respectfully submitted,

Walter McEwen

INTRODUCTION

> "Whatever you do adhere to the Union - we are a great country, and shall become one of the greatest in the universe if we preserve it; we shall sink into insignificance and adversity if we suffer it to be broken."
>
> - John A. Macdonald, 1861

The nation forged together at the 1864 Conference in Charlottetown - a sprawling, fragile nation - has undergone throughout its history times of crises which challenged its people to manifest a spirit of tolerance, understanding, respect, generosity, flexibility and leadership which transcended its sometimes factional character. That Canada has prospered, let alone survived, is a tribute to Canadians who shaped their national will and identity based on the principles of compromise, consensus and goodwill. While "peace, order and good government" is hardly a stirring rally call to ardent nationalism, it served nonetheless to unite Canadians in common cause.

Now, during this summer of 1991, faced with new challenges, Canadians are once again searching their hearts and minds to arrive at a new understanding and vision of their country. The next year, marking as it does the culmination of the present round of constitutional reform, will result in a new Canada, or one which will be on the verge of disintegration.

One fact is certain: the existence of the nation that grew and expanded across this sprawling and diverse land from sea to sea to sea is now in serious jeopardy. Competing visions of its future, conflicting demands for new and radically different forms of constitutional arrangements, a growing sense of political disenchantment and betrayal, an erosion of confidence and shattered hopes and dreams are the debris of mounting doubts about the future of Canada.

And now, during this summer of 1991, a new sense of urgency brought about by the realization that deadlines must be met and fundamental decisions reached, is forcing Canadians to once again forge a vision which captures the essence of their country and which guides their collective future, together or apart. It is a daunting prospect, and one which ultimately rests on the strength of the national will to survive.

The Special Committee on the Constitution of Canada was established to examine and reconcile the competing visions of Canada and to make recommendations on courses of action on how to achieve a strong and united Canada. Your Committee conducted public hearings to consult with interested Islanders from mid-May to late June of 1991. It received thirty four presentations from individuals and organizations. (See Appendix 1)

From the outset, your Committee was told that the status quo had ended, and that the present round of constitutional reform will have far-reading implications for Prince Edward Island and for Canada. This view is shared by your Committee.

Throughout the public hearings, your Committee was deeply impressed with the thoughtfulness and sincerity of the presentations, struck with their depth of passion and conviction, and above all, guided by their conclusions. Your Committee is deeply appreciative of the contributions made by the public to its work.

Your Committee heard proposals for new and different constitutional arrangements. It heard doubts and skepticism about the institutions and processes of governments. It heard from groups who have a vital stake in the outcome of constitutional reform. And it also heard, in eloquent terms, from young people for example, who spoke of their concerns and hopes for the future of their province and country.

Your Committee was particularly impressed by the contributions of those young Prince Edward Islanders who appeared before it. Their sense of optimism and hope, and the forthright expression of their views, were both reassuring and refreshing at a time when many Canadians appear to be deeply divided. Your Committee suggests that the nation's renewal may draw inspiration from the shared values of its young citizens.

It heard, again and again, the message that the people of Prince Edward Island want a strong and united Canada. It heard, too, the hope - and belief - that the present round of constitutional reform provides an historic and perhaps unprecedented opportunity to finally address some of the long-standing issues and questions which have hounded the nation, and at the same time, begin the creation of a new, stronger and more united Canada.

Certainly, the fires of constitutional reform are sufficiently intense to enable the nation to be forged again. In their re-kindling, it is hoped that the vision expressed at the Charlottetown Conference can also be re-kindled. It would be tragic if the fires led to a conflagration which engulfed the country.

Following is the report of your Committee. It is submitted in the humble belief that, in the coming round of constitutional reform, Prince Edward Island has a vital role to play. Its tradition of strong local autonomy and identity, combined with its pride of place as a part of Canada, provides it the opportunity to exercise enlightened leadership in the constitutional issues and the agenda being considered. A balanced, flexible approach is needed now, as never before.

There is another compelling reason for Prince Edward Island to exercise a strong and effective role during the forthcoming discussions. That reason rests on the fact that Prince Edward Island, as Canada's smallest province, can come to the discussions with no strong, vested interests. Traditionally, the province's contributions have been objective, rational and credible, and it has exercised its role as a mediator while putting the nation's interests and well-being as a whole first and foremost. It performs a role which far exceeds its size.

At stake are decisions which will affect every province, perhaps none more significantly than this province. The outcome is critical, not only for the rest of Canada, but especially for Prince Edward Island.

As the Birthplace of Confederation, Prince Edward Island can be justifiably proud of its contributions to the Canadian nation. The forthcoming round will provide it the opportunity to again contribute - this time to the re-birth of Confederation.

1. THE CONSTITUTIONAL REFORM PROCESS

During the present round of constitutional reform, there is a perception that the process of reform is just as important as the substance of reform itself. The failure of the Meech Lake round, and a sense of disenchantment with political institutions and processes have prompted many people to advocate a more direct role and involvement of citizens themselves in the constitutional reform process. "Allowing politicians to sit behind closed doors and define what Canada will or will not be shall not be tolerated any longer", said Gerald MacDonald, the first person to appear before your Committee.

His view was echoed by the second person to appear. Anthony Miller said, "You've got to leave the Constitution to the people because the people will democratically guide you, the politicians, in formation of a just and fair Constitution." Yet, while both want the public more involved, they offered different conclusions on how that might be achieved. Throughout the public hearings, your Committee discussed at length various proposals to ensure greater public input to the constitutional reform process.

Your Committee is unanimous in expressing the hope that the present process will be open, accessible and responsive to the views of all Canadians.

The Amending Process

From the outset, your Committee was guided by the fundamental belief that, if constitutional reform is to succeed, it must be legitimate, credible and based on the support and undertanding of the people of Canada. A nation cannot continue and survive and flourish if its people don't want it to. Beyond that, however, there is a more fundamental imperative. The sense of family and community shared by Canadians must also find expression at the national level, manifesting itself in the strengthening of a national will and purpose. Constitutional change must reflect, and respond to, the shared and common aspirations of all Canadians.

Giving expression to such aspirations is quite another matter. From the beginning, the goal of all democracies has been to improve the means whereby the public will can be expressed, and it remains an elusive goal. In the present round of Constitutional reform, various mechanisms have been established to give expression to the views of Canadians, from Legislative Committees to citizen's forums. At the same time, there have been proposals on such instruments as a referendum to enable Canadians to directly decide on their collective future. A national referendum on constitutional change would, it is argued, give Canadians a direct voice over the future of their country.

Many of the discussions centered around one proposal in particular: the establishment of a constituent assembly. "After 125 years of union", said the Societe Saint-Thomas d'Aquin, "It

seems that the Canadian population is not only able to formulate its own constitution but also deserves this opportunity." The Societe proposed such an assembly be made up of three groups: elected officials; those constitutional subjects recognized in the Charter of Rights such as linguistic minorities, women, the disabled, and so on; and aboriginal people.

Others advocated a constituent assembly selected at random. Isabel MacDonald told your Committee that it should be broadly representative of different groups within society. Others, such as Dr. Tom Connor and George O'Connor felt a constituent assembly might consist of those who could provide informed advice to politicians.

Your Committee recognized that the process of constitutional reform must involve Canadians as much as possible, and that those responsible for the process must be held accountable.

That issue of accountability, in fact is one of the major reasons that many were opposed to the concept of a constituent assembly. Overwhelmingly, by close to three to one, those witnesses with whom your Committee discussed the concept were not in favour of a constituent assembly. While in favour of greater public input, such as that provided by your Committee itself, these witnesses said they want the process to be accountable to citizens. "As a voter, I want the constitution, with all its associated sensitivities, handled by someone I can hold accountable," said Ivan MacArthur. "I cannot hold an appointee, or a representative from an interest group or a name generated from a computer list accountable."

A joint presentation made by J. Ivan Dowling, Frederick Driscoll, (Rev.) Allan F. MacDonald and Joseph J. Revell said a constituent assembly based on representation by population would diminish Prince Edward Island's status as one of ten equals at the constitutional table. "In our view," states their presentation, "Legislatures are the proper bodies to deal with constitutional change in this country."

The concept of more direct participation by citizens in decisions about the Constitution was also questioned because, ultimately, formal adoption of constitutional changes, under the present system, must be carried out by legislatures. Proposals that a constituent assembly consist of delegates voting in accordance with the wishes of their "constituencies" would also challenge some of the present notions of parliamentary government, in which members are guided by the principles of representative, rather than delegate, democracy. As Mr. Driscoll told your Committee, "We're in danger of over-reacting and changing the system. We're saying you are the people to do this for us. We elected you. You look after our constitutional interests."

Still another reservation about the concept was expressed by Professor Wade MacLauchlan. He believed that a constituent assembly would have to make significant progress towards a consensus in a very short period of time, and that time period would likely not permit the holding of a formal constituent assembly.

Other proposals were also advanced on the process of constitutional reform. The Societe Saint-Thomas d'Aquin proposed that the Constitution be reviewed every twenty years, for example, and that all constitutional amendments be presented during a national referendum. On the other hand, the Advisory Council on the Status of Women favours retention of the present amending formula as the best means to protect women and other people who belong to minorities. Even the Societe does not believe that a referendum should deal with minority rights.

Your Committee is therefore not prepared to recommend the establishment of a constituent assembly as part of the constitutional reform process. Your Committee concludes that such a concept, as well as the conduct of a referendum at this time, is too unwieldy and fraught with difficulties to enable it to make it an effective contribution to reform of the Constitution. Your Committee believes it is the responsibility and obligation of elected legislators, in the tradition of representative democracies, to deal with such decisions.

Your Committee, however, proposes an important exception. While it did not hear directly from representatives of aboriginal people, it believes that their views must be more formally included as part of the present round of constitutional reform. It would be presumptuous of your Committee to recommend on what basis, and in what fashion, aboriginal groups represent themselves in the present round; that is a decision aboriginal groups themselves must reach. Nonetheless, your Committee recommends that aboriginal peoples formally participate during the process of Constitutional reform.

The Amending Formula

At present, regardless of the process of constitutional change, the ratification of such changes must be achieved under the 1982 amending formula. The general amending formula in section 38 of the Constitution Act, 1982 requires the consent of the Senate, the House of Commons and the legislative assemblies of at least two-thirds of the provinces with at least fifty percent of the population (the 7-50 rule). Under section 41 of the Act, unanimous consent is required for changes to some national institutions, to certain constitutional provisions respecting the use of English and French, and to the amending formula itself. The amending formula proposed under the Meech Lake Accord could have extended the unanimity requirement to, for example, the creation of new provinces.

Your Committee believes, from the perspective of Prince Edward Island, that no further changes in the amending formula are needed at this time. The general amending formula adequately reflects the demographic nature of the country and the unanimity requirement assures every province of an equal voice on other significant matters.

Your Committee believes, however, that in the interests of national unity, and to ensure that the Province of Quebec, for example, is able to protect its linguistic and cultural identity, changes may be needed in certain provisions requiring unanimity. In other words, while your Committee is not proposing changes to

the amending formula itself, the provisions which require unanimous consent may be expanded. This would ensure that all provinces, including the province of Quebec, would be able to protect and promote their vital interests.

There is, of course, considerable question and debate throughout Canada about the status the Province of Quebec is seeking during this present round. Many regard demands for a Quebec veto over all constitutional reforms as excessive. Others are prepared to grant Quebec certain additional powers which would enable it to protect its linguistic and cultural status.

These were some of the issues which contributed to the demise of the Meech Lake agreement.

Professor Maclaughlan told your Committee that "There is no good reason to believe that a general veto for Quebec, as recommended by the Allaire Report, or one that is shared with Ontario, as recommended by the Beaudoin-Edwards Committee, will be any more readily accepted." He concluded that if the 1991-92 round is to have a realistic chance of success, "the amending formula ought to be left alone."

Nonetheless, it appears the Province of Quebec may be seeking some additional powers in terms of the constitutional amending process, but it is not as yet so apparent what those additional powers might be. Accordingly, your Committee recommends that, while the amending formula itself remains unchanged, it is prepared to consider extending those provisions

requiring unanimity in order to provide Quebec with the means to protect and promote it linguistic and cultural identity as long as the equality of all provinces continues to be guaranteed in the Constitution.

Quebec's Status Within Canada

Your Committee believes that one of the fundamental prerequisites for the process of constitutional reform is a recognition of distinct society status of Quebec. That recognition is not only an acknowledgement of the distinctiveness of Quebec society, but also a recognition that those distinctive characteristics of Quebec society have contributed to the shaping of the Canadian nation. They must be preserved and promoted in a united country.

If the rest of Canada is unable to give explicit recognition to Quebec's desire to preserve its language and culture, then it is very likely unable to accommodate the diversity of its other regions and peoples. In the recognition of Quebec as a distinct society rests the guarantee that other Canadians will also find their place in the future of this country.

There are also significant historical precedents for such recognition. The Royal Proclamation of 1763, the Quebec Act of 1774, the Constitutional Act of 1791 and the Act of Union of 1840 all gave explicit recognition to Quebec's laws, language, culture and religion. There is nothing new in the recognition of the distinct society status of Quebec.

Your Committee also heard strong support for distinct society status for Quebec. "Quebec should be recognized as a distinct society," said the Dowling/Driscoll/MacDonald/Revell presentation. "The distinct nature of Canadian society is a product of our past and a feature of our present." Ivan MacArthur said, "For my part, I have no problem accepting the notion of Quebec as a distinct society." And Paula Likely said this of Quebec, "I would feel a terrible sadness if it were torn from the Canadian mosaic."

At the same time, your Committee heard from those who do not want to see a special status for Quebec. One individual who appeared before your Committee lamented the apparent passage of some of the symbols of English Canadian culture. "I don't want a constitution for a nation that is going to continue to make me feel that way," said James Follwell. "Something like the 'distinct society' makes me feel that way." Milton Fitzpatrick said that "I think perhaps my greatest concerns are what further concessions will be made in order to satisfy the Province of Quebec." "Others", he said, "expect 'equal treatment'. John Curtis told your Committee that "I can understand Quebec wanting protection for its language and culture, but they are not going to be a country within a country." These concerns reflect a desire that all provinces remain as equal partners within Canada.

While there is support for recognition of Quebec as a distinct society, many are not prepared to grant it special powers. Your Committee acknowledges the difference between "distinctiveness" and "special status" and wishes to point out that a province can be distinct without being granted special powers. The difference - often the cause of confusion - is important.

Another individual recognized what he termed the "legitimate aspirations" of French Canadians in preserving their language and culture, but felt that it is now flourishing as never before, and needs no additional protections. George O'Connor expressed his concerns about the protection and promotion of the English-speaking community in Quebec. "I am sure that everyone wants a way found to keep Quebec in Canada but not at any cost and certainly not at the cost of agreeing to the loss of individual rights for the English in Quebec," he said.

This issue was addressed by the Societe Saint-Thomas D'Aquin before your Committee. While not in agreement with Quebec language laws 178 and 101, for example, the Societe believes that "a constitutional veto for Quebec is an acceptable minimum to reintegrate this province in the Canadian family, provided Quebec respects the national standards in terms of health, social services, education and constitutional rights and freedoms."

On the question of language rights as well, the Acadian Communities Advisory Committee would also like to see the two official languages recognized by every province on the same basis as provided for by the federal government. The Advisory Committee also provided an interesting reminder that constitutional guarantees are not always necessary to protect or promote the two official languages. Referring to the Government of Prince Edward Island's adoption of the Provincial French Services Policy and the implementation of the General Agreement on the Promotion of Official Languages, it said that "very few provincial governments have shown such compassion towards their official language minority."

Your Committee is aware of the deep concern shared by many Canadians about what has been termed a "double standard" in the recognition of language rights in Quebec and throughout the rest of Canada. At the same time, it shares the hope that Quebec may reconsider its restrictive language policies while continuing to protect and promote the French language and culture.

Your Committee recognizes, too, that easy parallels cannot be drawn between the situation of anglophones in Quebec and francophones outside Quebec. As someone quipped before your Committee, he would "much rather be an anglophone in Quebec than a francophone in any other province."

Your Committee wishes to acknowledge, however, the legitimate concerns of Canadians about the issues of language rights, the override provisions and their implications for the Charter of Rights and Freedoms and other issues arising from granting special powers to Quebec. While these obviously exacerbate the present situation and are cause for concern, your Committee believes these issues go beyond the present constitutional problems for which a resolution is being sought. The issue at hand is that of a distinct society status for Quebec; once acknowledged and entrenched, it will be for governments to deal with the way in which Quebec society evolves and the issues inherent in such evolution.

In terms of what a constitutional recognition of distinct society status for Quebec could mean, the Dowling/Driscoll/MacDonald/Revell presentation suggested that Quebec may need

powers to preserve its cultural identity, and that such powers must be negotiated. The Prince Edward Island Federation of Labour, while expressing the belief that the people of Quebec have the right to self-determination, expressed the desire that Quebecers continue to build a strong, vital Quebec within a strong, independent Canada. "To achieve this," stated the Federation, "New power sharing arrangements must be negotiated between levels of government to enable Quebec and other provinces to protect and nurture their unique cultures, to eliminate administrative duplication, and to ensure programs are sensitive to local needs."

Your Committee has therefore concluded that constitutional recognition of special status for Quebec is a fundamental prerequisite to the process of constitutional reform. Your Committee recommends that Quebec be constitutionally recognized as a distinct society and that it be extended those powers which are necessary to protect and promote its language and culture so long as all provinces remain equal under the Constitution .

What is at issue here is whether Canadians can express their understanding, tolerance and respect for one another. A spokesperson for the Societe Saint-Thomas D'Aquin, when asked what might happen to francophone minorities in the event of Quebec separation, expressed the hope that Island Acadians should not have to depend on Quebec's place in Canada in order to survive. "Canada should be strong enough, and adult enough" to ensure the survival of its two founding groups, it said. Your Committee hopes the present round of constitutional reform can embrace that notion.

2. TOWARDS A NEW CANADA

The one single, prevailing and underlying theme in the presentations before your Committee is that the status quo is finished and that Canada will emerge from the present round of constitutional reform as a significantly different country. Related to this were concerns about the future of Quebec within Confederation; there was a general consensus that Canada must remain united and that some way must be found to accommodate Quebec's aspirations within the Canadian polity. These issues were summarized in this way by Professor MacLauchlan:

> My most basic concern is that, I think Canada is in a process of deteriorating, or even disintegrating as a political community, and I think that what happens in this 1991-92 round of constitutional reform will either arrest and perhaps start us off on a new process or, in fact, it will be the beginning of the recognition that we truly have failed in our project as a political community.

Many of the presentations reflected similar concerns about the future of Canada. As Charles DesRoches told your Committee, "Again we have come to a very important crossroads, a time of self-reflection, of defining our nation." And Kevin Ryan talked about the need for "recapturing emotion in government."

There is also concern about the erosion of national institutions, programs and services which have traditionally been symbols, and a means of expression, of Canadian unity. The federal government's decentralization policies, often at the expense of regions, and its perceived abandonment of a unifying national will and consensus, were seen as contributing to that erosion. Dr. Herb Dickieson expressed the hope that, in the spirit of Sir John A. MacDonald, the present federal government would "promote those federal institutions which tie our country together from sea to sea, as opposed to forcing us into a situation of north/south ties which will, perhaps, disintegrate us as a country."

And yet, at the same time, a number of presentations before your Committee saw in the present malaise an opportunity to begin anew, to redefine a vision of the country, and to resolve some of the outstanding problems which constrained its capacity to realize its potential. The Dowling/Driscoll/MacDonald/Revell presentation predicts within two or three years a federal state significantly different from the one most Canadians have known, and while conceding that was reason for concern, suggested that "Rather, it should be viewed as an opportunity to create a better nation." The presentation added, "We can, then, view our present difficulties as a challenge, as an opportunity to do better, as an invitation to build a more equitable and more tolerant country." And a representative from a group of students from Charlottetown Rural High School put it more pointedly: "Let's get it right this time."

John Loome told your Committee that if Canada were to meet the challenges of becoming more competitive internationally, it needed a clearer sense of direction and greater coordination in its economic and social policies. "Now some of the things I've talked about may require constitutional change; some may not. They are, to me, part of what must be discussed if we are going to talk about a major constitutional change in this country. Otherwise, we are applying band-aids." Something of the same view was also expressed by Dr. Connor when he said, "Whether Canada stays together or not, we must look to our economic strengthening and survival."

Another presentation to your Committee said the problems facing Canada are more serious than those related to the shape the country is going to take. "In our view," said REALWOMEN/PEI, "The constant, unrelenting attacks on church and family make for Canada a much more fundamental problem than whether it gets reshaped politically."

A presentation from the Prince Edward Island Federation of Labour, referring to what it termed "the desperate state of the Canadian economy" said that solving some to the country's underlying problems is an integral part of the constitutional reform process. "The federal government must be made to understand that it cannot divorce constitutional issues from economic issues," stated the Federation.

Your Committee, following consideration of these and other comments, recognizes the concerns of people in that a great deal is at stake during the present round of constitutional discussions. What is at stake is not only the unity and survival of the nation, but also a host of other questions: regional disparity, cultural sovereignty, minority rights, the division of powers and a collective notion of what Canadians expect for themselves, for their fellow citizens and for their nations. In seeking to define a vision for a "new Canada", constitutional reform has been given a significance, perhaps far beyond its original intent and purpose. The political stakes would seem to require fairly drastic constitutional reforms if the aspirations of all provinces, including Quebec, are to be met.

The scope and nature of such constitutional reforms relate to several broad areas, including; the institutions of governments; divisions of powers; the concept of federalism; the recognition of aboriginal people; and the protection and promotion of individual and collective rights. It is clear that while constitutional measures can help define and elaborate these matters, their expression is also a function of the exercise of political and popular will. At the same time, it must be recognized that a substantial body of conventions surround the constitution which strongly influence the structure and function of public affairs.

Your Committee believes it is important that a reformed constitution be based upon the common values, hopes and aspirations of Canadians. A constitutional statement of objectives of the nation as a whole would serve to unify those things which Canadians hold in common. Through a definition and articulation

of what Canada - as a nation - represents, it would also serve to provide protection for "the Canadian dream". It must also be recognized that the federal government, while it performs a central role, does not have exclusive responsibility or jurisdiction in this regard. A constitutional statement of national goals and objectives, and of a national identity, would also commit provincial governments to their attainment.

A constitutional statement, giving expression to those things Canadians share and hold in common - and hope for - would serve to transcend the sometimes factious nature of the country, its regions and its people. It would serve as both a reminder and inspiration for governments and people alike.

Numerous presentations before your Committee referred to the need and desirability of somehow, expressing through the constitution a "vision" of the nation, its philosophy and the common hopes, beliefs and values of its people. As the Societe Saint-Thomas d'Aquin stated, "A constitution is therefore a document which directs the 'method of governing' but in view of broader objective..."

Given the fundamental issues and decisions which all Canadians now face, in their quest for a "new Canada", <u>your Committee recommends that the preamble to the constitution confirm and give expression to the underlying values of Canadian society. This would be accomplished through the inclusion of a "Canada Clause" in the Constitution.</u>

The Canada Clause

The Canadian nation is a mosaic, consisting of a diversity of races, cultures and regions. Despite the richness of this diversity, Canadians hold a great deal in common, perhaps more than they realize. The constitution should give recognition to the fact that Canada is a multicultural society, which recognizes the languages and cultures of its two founding groups and its aboriginal people. Within the context of a pluralist society, all Canadians, in a spirit of tolerance and understanding, can enjoy full equality of rights and freedoms.

In its presentation to your Committee, the Prince Edward Island Multicultural Council stressed the importance of recognizing the contribution of all cultural groups to the growth and development of Canada. "We must all be Canadians first, but we can also be Canadians of ethnocultural descent. This enables us to have a national identity but also retains facets of our self-identity which are linked to our heritage," it stated.

In brief, a "Canada Clause" would be a general interpretative statement which would express the basic characteristics of Canada as a society. It would explicitly recognize and endorse the diversity of Canadian society, and give expression to the common values of all Canadians.

Your Committee recommends a "Canada Clause" with a caveat, however. In his remarks, Professor MacLauchlan warned that including such a clause and drafting one are two quite different

matters. In his view, there are many risks if it proves not to be an edifying process in terms of people's sense of citizenship and their civic spirit of the community generally.

Your Committee believes this to be a step of fundamental importance in guiding the principles of constitutional reform.

The Charter of Rights

Your Committee heard a number of presentation which made reference to the Charter of Rights and Freedoms, as introduced in the 1982 amendments, which explicitly recognized individual rights. The presentation from Dowling/Driscoll/MacDonald/Revell made the point that while the need to protect individual rights is important, "Canadian Federalism must give appropriate recognition to collective rights." It argued the importance of recognizing collective or group rights, which may transcend and supercede individual rights. Your Committee believes, for example, that property rights should not be included under the Charter because of Prince Edward Island's need to protect and preserve its land resources.

Prince Edward Island is in a unique situation in terms of property rights. Its early history was dominated by the struggle of its people against a system of absentee land ownership. The issues of land ownership and land use are recurring themes throughout its history as a province. As an Island, the protection and preservation of its shoreline and its agricultural land are crucial. There are continuing concerns about non-resident

and corporate ownership of those finite resources, and under the Lands Protection Act, the Government of Prince Edward Island has imposed limits and restrictions on such ownership.

And, as the Environmental Coalition of Prince Edward Island pointed out in its submission, there may also be compelling reasons from an environmental perspective to protect land resources, among others. It proposed, in fact, that environmental protection be entrenched in the Constitution.

In previous constitutional agreements, Prince Edward Island achieved recognition of its need to legislate on property rights, and they were not included in the Charter. Your Committee's belief that they should not be included in the present round is consistent with the traditions of the province and the recognition of its rights in previous constitutional agreements. Not including them in the present round would both be an acknowledgement and recognition of Prince Edward Island's "distinctiveness" on the issue of property rights.

As well, the Prince Edward Island Advisory Council on the Status of Women said it is concerned about any possible changes to the Charter: "Our concern is that the basic Charter of Rights and Freedoms will be eroded or lost and that women will not have the protection necessary..."

At issue here is the potential conflict between individual and collective rights, and, more specifically, the power given to legislatures to exercise the notwithstanding clause. It must be

recognized, however, since its inception, the Charter has been invoked in hundreds of cases before the courts and that the notwithstanding clause has only been exercised twice since 1982. Given the body of law and precedents being established, it would seem prudent not to amend the Charter during the present constitutional round.

Your Committee therefore recommends that the Charter of Rights and Freedoms not be included as part of the current constitutional process and that there be no amendments or additions at this time without further consultation or discussion. There is simply no compelling need to include it on the present constitutional agenda.

Aboriginal Rights

Overwhelmingly, your Committee was told that aboriginal rights must be recognized in the present round of constitutional reforms. On virtually no other subject was there such broad agreement. Increasingly, it appears that Canadians are more prepared than ever before to respond to the demands of native people.

Your Committee, however, is somewhat reluctant to advance specific recommendations on this issue. First of all, it notes the fact that native leaders across the country have made it quite clear they want to represent their own constitutional issues. Second, your Committee is cognizant of the fact that the native community has not yet finalized its constitutional goals and objectives.

There is no question about the fact that aboriginal people are seeking more control and ownership of resources and greater autonomy in their affairs, as well as fuller participation in Canada generally. What is at question is the way in which these aspirations and demands can be accommodated and advanced in the present constitutional round. One practical difficulty was identified by Ivan MacArthur: "... one model may not fit all when it comes to native self-government due to the diverse nature of native communities in terms of population and land base."

The constitutional process will have failed aboriginal people, however, if there is no progress on their issues during this round. While it would be presumptuous of your Committee at this stage to make specific recommendations on aboriginal rights, it believes that aboriginal rights to self-government must be recognized in principle during the present round of constitutional reform as a first step to their fuller participation in the future of Canada.

Institutional Reform

While the nature of the political and governmental processes throughout Canada have evolved and changed significantly since Confederation, the institutions of government have remained virtually unchanged. Your Committee heard a number of criticisms of politicians and about the structure and functioning of political and governmental institutions. It also heard a number of suggestions for reform.

The Federation of Labour, for example, recommended that some form of proportional representation be examined for adoption in Canada. Referring to what it terms the growing alienation of Parliament from the people and the provinces and territories, it said, "Our first-past-the-post electoral system ensures that a minority of Canadians can usually elect a majority government" and that "such majority federal governments have increasingly been inclined to pursue their own agenda..." In addition to the examination of a system of proportional representation, the Federation also recommended changes to the Senate to more effectively represent the provinces and territories.

Your Committee also heard a number of other suggestions for political and institutional reform, some of which would require constitutional changes, while others would not. These include more free votes by elected members; the right of recall of elected representatives; direct election of the prime minister; specific provision for elected minorities; and so forth.

Many of these proposals would significantly alter the way Canada is governed. Some would lead to features of a U.S. - style government with some of the characteristics of a presidential system, quite unlike the Westminster Model with which most Canadians are familiar. Others may be unworkable, simply because they fail to take into account many of the informal conventions which determine political practices.

Members of your Committee recognize, however, the growing alienation of many people from politics and government. They recognize at the same time, regardless of the outcome of constitutional reform, the need for institutional reforms if people are to be better served by those they elect to represent them. That challenge will remain long after the mandate of your Committee is concluded.

Members of your Committee also recognize that changes in the functions and structures of representative democracies are often slow and cumbersome, and can often only be undertaken following a protracted public debate. It is doubtful that drastic changes in the way Canada is governed can be quickly and effectively achieved. It is practically certain that consensus on a wide range of institutional reforms will not be reached during the coming year for inclusion in the next round of constitutional reforms.

Nonetheless, your Committee believes that the next round of constitutional reform must address the subject of institutional reform, to begin the process of establishing the political and governmental processes and structures which Canada will require as it enters the 21st century. Reform of the Senate, for which there is a growing consensus, would be a logical and effective starting point. Indeed, Senate reform is inextricably related to a number of other constitutional reforms.

If a "new Canada" is to emerge, and if it is to more effectively address the diverse and disparate interests of minorities, or regions, and of other collective and individual rights, it must have not only the will, but also the means, to protect and promote those interests and rights. That can only be assured by institutional reforms which result in an explicit mandate to ensure those interests and rights are recognized and met. A reformed Senate, with more specific and focused powers, could provide a more effective regional voice in national institutions. Your Committee believes that Senate reform is essential, and if it is not possible to proceed in this present round of constitutional reform, it recommends that it be undertaken in the next round of constitutional discussions.

Much of the impetus for Senate reform has come from Western Canada in particular, which sees a Triple-E Senate (elected, equal and effective) as a means of achieving greater recognition of, and response to, its needs and interests. Others see a reformed Senate as a means of protecting linguistic and other minorities. A reformed Senate might also have a mandate to ensure that national standards were maintained and to protect the interests of "have-not" areas in pursuing regional development goals. In short, a reformed Senate is inexorably bound to the need to preserve the fabric of the "new Canada"; in it could be found the means of expressing and nurturing the common will and identity of all Canadians.

Your Committee also believes it is essential to better balance regional representation in a reformed Senate. This would provide each province and region of the country with a more

equitable representation, and would make it more effective in performing its new mandate. A reformed Senate, with explicit powers to protect and promote the needs and interest of the provinces and regions in national affairs, is of considerable importance to this province. A reformed Senate must be effective in providing the necessary protections to individual provinces and regions.

A reformed Senate might also assume additional responsibilities in the area of the environment. As the Environmental Coalition of Prince Edward Island pointed out, politicians "do quite a commendable jobs representing their constituents but do a very poor job, for the most part, representing their constituency in terms of the land and water on which their constituents live." A reformed Senate could become the advocate for the interest of such "constituencies".

It has been suggested to your Committee that Prince Edward Island, with a reformed Senate, would help counter balance the preponderant voice of Ontario and Quebec in national government. However, Professor MacLauchlan pointed out that it may not be realistic for Prince Edward Island to seek equal representation in a reformed Senate. He referred to discussions of a Joint Committee of the Senate and House of Commons in 1984 which pointed out that one Prince Edward Island resident would have the same voice in a Triple-E Senate as seventy Ontarians or fifty Quebecers. The Joint Committee feared such inequities could jeopardize a reformed Senate's credibility.

Professor MacLauchan supports the Joint Committee's proposal, subsequently adopted by the MacDonald Commission in 1985, in which Ontario and Quebec would each have twenty-four seats, Prince Edward Island would have six, all other provinces would have twelve, and the Territories would each have two. He said Prince Edward Island should give consideration to supporting that proposal in the present round. Your Committee recommends that Prince Edward Island seek more equitable representation in the Senate.

While the majority of those who referred to Senate reform favoured an elected Senate, your Committee was unable to reach a consensus on whether or not to recommend that Senators be elected. However, your Committee recommends that should Senators be elected, they be elected according to individual Senate constituencies rather than on a province-wide basis in order to reflect the rural character of Prince Edward Island. Your Committee notes that Alberta's nominee for appointment to the Senate was voted upon province-wide. This could lead to under-representation in less populated areas. Your Committee rejects a system whereby Senate candidates would seek election on a province-wide basis.

In short, your Committee recommends a Senate with more specific and focused powers to reflect and represent the diversity of Canada. While the House of Commons would retain its predominant role in Parliament, a reformed Senate might be given greater scope in terms of the introduction of legislation, (except money bills) and powers to suspend and/or amend

legislation from the Commons, without, however an absolute veto. A reformed Senate would not have the absolute power to defeat or delay legislation from the House of Commons. It would, however, have special responsibilities to review legislation respecting federal-provincial relations, language rights, minority rights and the rights of individual provinces.

As a second chamber, the focus of the Senate would be somewhat different from that of the House of Commons; its effectiveness will rest on its capacity to ensure the protection and promotion of national standards and the reconciliation of conflicting needs and interests with the common goals of Canadians.

The Division of Powers

Perhaps one of the most contentious issues facing the next round of constitutional reform is that of the division of powers, between the federal and provincial governments. Any broad-scale devolution of powers, jurisdictions and responsibilities to the provinces, without taking into account the fiscal capacity of a province to assume them, is of critical significance to Prince Edward Island.

At the same time, there exists the potential that a patch-work of provincial programs and services would result from some provinces seeking to exercise greater jurisdiction and more control over what have long been areas of federal responsibility.

National standards in social policies are one example; and the devolution of some economic policies and programs would also tend to exacerbate provincial and regional disparities.

In its brief, the Federation of Labour was critical of the federal government's withdrawal from areas of its responsibility and jurisdiction. "We have witnessed the continuous undermining of national institutions such as the CBC, CNR, Air Canada and the Post Office", it said. Your Committee is also concerned that a decline in federal involvement will result in increasing pressure for provinces and individuals. While your Committee recognizes the necessity of limiting expenditures and controlling deficits, it also recognizes that an important principle - the need for a strong, central government - is at stake.

The question, essentially, is this: how much of a devolution and/or erosion of federal powers takes place before national standards are jeopardized or before the idea of a country is lost? Related to this is the question of the detrimental effects it could have on provinces, such as Prince Edward Island which lacks, presently at least, the fiscal resources to maintain standards even approximating those enjoyed by other provinces. If the federal government is proposing to devolve additional powers or responsibilities to the provinces, there must be an assurance that the provinces are provided with the fiscal capacity to assume them. In the case of Prince Edward Island, with limited fiscal capacity, this would mean new agreements with the federal government for additional financial resources. As Roy Ridlington told your Committee, "It's

absolutely essential that some kind of fiscal transfer payment policy between the federal government and less economically advantaged provinces has to continue." These are some of the most serious questions to be dealt with in the present round of constitutional reform.

Your Committee believes that if the present round of constitutional reform results in a decentralization of the powers and responsibilities of the federal government, and greater devolution of these to the provinces, two significant and related issues must be resolved. The first is that there must be a concomitant transfer of fiscal resources to the provinces. Secondly, national standards must be maintained. Your committee recommends these as fundamental preconditions to any changes in the division of powers.

Still, your Committee is concerned about the issue of decentralization of powers. From the perspective of Prince Edward Island, a strong, central government still provides the best guarantee that its interests are protected and promoted. Even so, however, recent experience has indicated that even in areas of federal-provincial cost-sharing, there are no guarantees if the federal government continues to reduce its commitments. Federal spending caps in health and post-secondary education, for example, create additional demands on the provinces, and cost-shared programs are by their very nature inherently biased against the poorer provinces.

The present round of constitutional reform must address the issues of national standards and fiscal equality. Professor MacLauchlan suggested that Section 36 of the Constitution Act, which provides for reasonably comparable levels of taxation, might be strengthened in the present round as a step towards the entrenchment of guarantees. He cautioned, however, whether such a provision could be enforced by the courts if necessary.

Professor MacLauchlan also suggested that a reformed Senate might be given some role in periodically reviewing the commitments and the effective equalization taking place from the federal government to the provinces. He also suggested that some form of block funding, on a per capita basis, might be entrenched in fiscal arrangements as such arrangements would provide more effective guarantees than some forms of cost-sharing.

Your Committee also heard proposals for new and different kinds of administrative arrangements between the federal and provincial governments. John Eldon Greene, for example, described the difficulties in reaching all-party agreement in fields of shared jurisdiction. "For this reason," he suggested, "A new approach to inter-governmental negotiations is required." In his submission, Dr. Connor expressed the view that there is a great deal of duplication and suggested that "some specific transfers of powers and clearer lines will likely lead to some efficiencies."

Yet, even with administrative decentralization of powers, part of the difficulty is that administrative authority could rest with one level of government and fiscal authority with

another. Your Committee believes it is imperative that the question of the division of powers be resolved in the context of the question of maintaining national standards and a resolution of the question of fiscal equality.

Your Committee recommends the present round of constitutional reform should entrench guarantees of national standards and fiscal equality, and more specifically, the principle of equalization.

Your Committee has not considered at length a new division of powers because it believes that a strong, central government is vital to the future identity of the country. As a minimum, federal involvement and/or jurisdiction should continue in fields such as monetary policy, foreign policy, defense, the environment, research, post-secondary education, culture and other fields which are crucial for the maintenance of national standards and a national identity. This list is not meant to be inclusive, but rather indicative of the areas of exclusive or shared jurisdiction which must remain in the hands of the federal government if Canada is to continue as a strong, united country.

The Prince Edward Island Fisherman's Association illustrated the critical significance of this issue. It said the federal government should maintain its jurisdiction in the area of fisheries management, for example. Referring to a possible transfer of responsibilities to the provinces - or to a sovereign Quebec - the Association said: "Neither a highly decentralized federal system or Quebec sovereignty would be in the best

interests of Atlantic Canada's fishermen. The inevitable district boundary and species management disputes that would result as new governments grapple for control over the fishery would occur at the expense of fishermen and fish stocks."

This potential consequence in the fishery illustrates and underlines the inherent problems in undertaking drastic changes in the division of powers. While your Committee concedes that some changes may be required, it urges caution in incorporating a new and decentralist concept of federalism in the present round of constitutional reform.

Summary and Conclusions

Prince Edward Island joined Confederation with a strong and proud tradition of local autonomy and self-government. It also joined Confederation with very specific terms and conditions in the full expectation they would be fulfilled and respected. Since that time, as the Confederation has changed and evolved, Prince Edward Island, as an equal partner, has participated in constitutional change from the perspective of its needs and aspirations as a province and those of Canada as a whole. In the present round of constitutional reform, such a balanced perspective is needed as never before as all provinces renew their place within Confederation.

The present round of constitutional reform poses critical choices for Canada. At this juncture in its history, Canadians must decide what kind of nation they want. And while there are many compelling questions and issues to be faced and resolved, of equal importance as the details are the process and the principals of constitutional reform. If Canadians can reach a consensus on the process and the principles of constitutional reform, as well as the details, they will have taken a significant first step to again, building "better than they knew" this nation.

Following is a summary of your Committee's recommendations.

The Amending Process:

- the process of constitutional reform must involve Canadians as much as possible, and those responsible for the process must be held accountable

- a constituent assembly should not be established at this time

- aboriginal peoples have the right to formally participate during the process of Constitutional reform

The Amending Formula:

- no further changes in the amending formula are needed at this time

- while the amending formula remains unchanged, provisions requiring unanimity be extended to provide Quebec with the means of protecting and promoting its linguistic and cultural identity as long as the equality of all provinces is guaranteed

Quebec's Status Within Canada:

- Quebec be constitutionally recognized as a distinct society and be extended those posers to protect and promote its language and culture so long as all provinces remain equal.

The Canada Clause:

- the preamble of the Constitution confirm and give expression to the underlying values of Canadian society through the inclusion of a Canada Clause

The Charter of Rights and Freedoms:

- the Charter of Rights and Freedoms should not be included as part of the current constitutional process and should not be amended or added to without further consultation or discussion

Aboriginal Rights:

- aboriginal rights to self-government must be recognized in principle as a first step to their fuller participation in Canada's future

Institutional Reform:

- Senate reform is essential, and if not possible to proceed in this present round, then in the next

- Prince Edward Island seek more equitable representation in the Senate

- While there is no consensus on the election of Senators, if they were to be elected, they should be elected according to constituencies rather than on a province-wide basis to reflect the rural character of Prince Edward Island

Division of Powers:

- changes to the division of powers must be accompanied by a concomitant transfer of fiscal resources

- national standards must be maintained

- guarantees of national standards and fiscal equality, and more specifically, the principle of equalization, must be entrenched

APPENDIX 1

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13. Mr. Milton Fitzpatrick
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18. P.E.I. Multicultural Council
19. Mr. John Eldon Greene
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